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Tax Alert

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Direct Tax

Tax credits transferred to the fiscal unit |Revenue Agency n. 536/2022

With the ruling n. 536/2022 the Revenue Agency has provided come clarifications regarding the transfer of tax credits to the fiscal unit.

More in detail, the ruling regards the transfer to the consolidating entity of the "energy tax credits" recognized to the so-called energy and gas high consuming entities (according to art. 15 and 15.1 of DL n. 4 of 2022 and 4 and 5 of DL n. 17 of 2022) included in the tax group, in order to allow the consolidating entity to perform the group IRES payments.

The ruling is relevant since it clarifies how the provisions regarding the transfer of credits to the fiscal unit interacts with the specific rules provided for the transfer of tax bonuses.

From one side, according to art. 7 of DM dated 1 March 2018 (concerning the application of the fiscal unit regime) each consolidated entity is allowed to transfer, in order to offset the IRES due for the tax unit, the tax credits available to offset pursuant to art. 17 of D.Lgs. 9 July 1997, n. 241, within the limits of art. 25 of such decree, for the amount not used on a stand-alone basis, as well as the excess of tax credits received under art. 43-ter of the Presidential Decree dated 29 September 1973, n. 602.

On the other side, the specific rules of the energy tax credits allow their transfer only for the whole amount to other entities, including banks and other financial intermediaries, who are not allowed to further transfer such amounts, except for the opportunity to proceed with two further transfers but to qualified recipients only (banks and financial intermediaries, entities of a bank group and assurance entities).

The ruling at hand, in line with some other interpretations on the transfer of other tax credits/incentives to the tax group already provided in the past, has confirmed that the energy tax credits can be transferred to the tax unit up to the amount of IRES (due as balance and advance payments) resulting from the consolidated tax return.

The issue, indeed, could have been solved by applying the ordinary rules of the mentioned art. 7, based on the assumption that the transfer represents a legitimate use of the tax credit (according to such provision, the consolidating entity is not allowed to transfer to third parties – qualified or not - the tax credits received from the consolidated companies, since the amounts received have to be used within the limits of the IRES due, and no excess transferrable can remain available).

In the ruling n. 536 the ITA specifies that the consolidated entities that transfer the bonus to the fiscal unit are allowed only to offset the remaining amount of such tax credit and not to transfer to other entities, since it would represent a partial transfer, not allowed by the law.

Bonuses to directors and executives | Revenue agency n. 539/2022

The Revenue Agency in the answer n. 539 dated Oct. 31, 2022 analyzes the tax treatment applicable to bonuses awarded to the managing director and a top executive.

Specifically, the recognized incentive plan provides, at the time of the completion of the sale of the entire share capital of the company, an extraordinary one-time cash incentive consisting of a fixed and a variable component related to the growth in the value of the company (to the director) and, again at the time of the completion of the Shareholders' Exit, an extraordinary one-time amount (to the executive) will be recognized.

According to the Tax Agency, the incentives represent a cost incurred by the company in order to provide the managing director and the top executive with supplementary remuneration for services rendered, with the result that the charge finds its cause directly in the existing employment relationship with the company.

In the present case, despite the fact that the right to receive the incentives depends on the completion of the transaction of the sale of the entire shareholding, the correlation between the cost incurred by the company and the exercise of its activity cannot be denied.

In fact, the bonuses awarded to the managing director and the top executive are intended to increase the commitment proffered in the performance of their work activities, with a positive effect on the company's business and thus, potentially and indirectly, on the company's value.

Finally, for the purposes of IRAP, excluding the equating of coordinated and continuous collaboration relationships with employee relationships, the costs corresponding to incentive bonuses assume relevance limited to the portion of them referable to the cost of personnel hired under permanent employment contracts, and therefore only for the portion referable to the top executive.

Going concern identification for the purpose of the art. 176 Italian Tax Code | Tax Ruling no. 549/2022

With the Tax Ruling no. 549 dated November 4th, 2022, the Italian Tax Authority clarified that a real estate property related to a shopping center owned by a bankrupt company, the coordination of whose activity was ensured by the action of the bankruptcy trustee, constitutes a going concern.

In particular, the bankruptcy trustee intends to contribute the bankruptcy assets to a NewCo and then transfer the shares of the NewCo to a third party. The bankruptcy assets subject to contributed consist of:

- an uncompleted real estate property designed for the construction of a shopping center;
- the authorizations and licenses for carrying out the activities;
- other asset and receivables;
- ongoing agreement related to the real estate property (including a going concern lease agreement).

The Italian Tax Authority, taking up various interpretations of the same Italian Tax Authority and the guidelines of the jurisprudence of Italian Supreme Court, defines a going concern as "*a set of miscellaneous assets, not necessarily owned by the entrepreneur, constituting a group of assets characterised by a "functional unity", determined by the coordination carried out by the entrepreneur between the different assets and the unitary destination of the same assets for a specific business purpose. Therefore, what is conferred must be a whole organically aimed at the exercise of a business activity independently appropriate to allow the beginning or continuation of that specific business activity by the transferee*".

The document shows how the bankruptcy trustee activity was not limited to the sale of the building but continued of the business; therefore, the buyer gets a combination of assets that, together with the related licenses and other elements, configures a whole of assets functional to the continuation of the business purpose from which they originate.

As a result of this conclusion, the transfer transaction is neutral for direct tax purpose pursuant to Article 176 Italian Tax Code and is subject to a fixed amount of indirect taxes.

PEX regime | Tax ruling n. 481/2022

The Italian Tax Authority (hereinafter "ITA"), through the answer to the tax ruling n. 481/2022, pointed out that in case of transfer of shareholdings between companies which are part of the same group, in order to verify that the residence requirement to apply the "participation exemption regime" (pursuant art. 87 of the IITC) is met, the taxpayer has to check for each and every fiscal year, whether or not the subsidiary qualified as "black-listed" (i.e. resident in a tax heaven Country) by applying the criteria provided for by Art. 47-*bis* of the IITC (so-called "ETR test")

In particular, in the ruling under discussion Alfa, a resident company holding a participation in Beta (a U.S. company), was the beneficiary of the capital repayment from this foreign company. This amount, pursuant Article 86 paragraph 5-*bis* of the IITC is qualified as capital gain and could benefit, if the conditions are met, from "participation exemption regime" pursuant Article 87 of the IITC. The questions submitted by the Alfa are three, respectively relating to the (i) verification of the commerciality requirement (as per Article 87(1)(d) of the IITC) in the case of structurally depowered companies; (ii) the assessment of the residency monitoring period in case of capital gains resulting from circumstance different from the disposal of the shares (i.e., distribution of capital), and (iii) the manner of verifying the aforementioned residency requirement. On the first point, the ITA clarified, recalling the contents of Circular n. 7/2013, that the structural depowering of the subsidiary sets this company in *de facto* liquidation *status*, so the commerciality requirement must be verified in the previous three tax periods regardless of the time of formal liquidation. On the second aspect, in the absence of a clear provision provided by the tax law, the ITA said that the distribution of capital and reserves of the foreign subsidiary is not comparable to a transfer of shares to third parties. Lastly, in relation to the third (and most interesting) question, the ITA pointed out that the residency's requirement must be met for each and every fiscal year, whether or not the subsidiary was qualified as "black-listed" by applying the criteria provided for by Art. 47-bis of the IITC (so-called "ETR test"). This makes the administrative burden to carry out this monitoring very expensive. However, such analysis cannot go back to fiscal years in which Italy did not have in place any specific measure against "black-listed" companies (i.e. the analysis should not be carried for fiscal years prior to 2002).

Pillar Two: update on the implementation of the Global Minimum Tax provisions

Pillar Two is the OECD's project aimed to the adoption of a system of rules that would ensure, on a global level, a minimum level of taxation of 15 percent on profits generated globally by large international groups which have annual consolidated group revenue of EUR 750 million or more. In order to implement this instrument as quickly as possible, immediately after the release of the implementing rules by the OECD (on December 14, 2021), the European Commission issued a proposal for a Directive aimed at implementing these measures into EU legislation. Nevertheless, the adoption and implementation

process of the Directive has been interrupted several times by vetoes imposed by some European countries (Poland and Hungary).

In the light of the above, on September 9, 2022, the economy and finance Ministers of the top five European economies (Germany, France, Italy, Spain and the Netherlands) issued a joint statement regarding the future of the implementation of the so-called Pillar Two. In this statement, the Ministers confirmed the intention to implement a global minimum tax measures as soon as possible and even though EU-wide implementation of Pillar Two is preferred (by means of an unanimously adopted EU Pillar 2 Directive), the countries will move forward with implementation even in the absence of an EU-wide agreement, if such is not obtained in a short period of time.

In this respect, on October 24, 2022, the Netherlands published a draft Pillar Two law, becoming the first EU country to have a draft law on Pillar Two. In particular, the draft has been released for public consultation (open until December 5, 2022). Thereafter, the draft law will have to follow the constitutionally prescribed process in order to be implemented. The purposes of the Dutch legislator would be to adopt the *Pillar Two* rules gradually, between 2023 and 2024.

Regarding Extra-EU countries, even the British government, through its Chancellor, announced in its Autumn Statement 2022 (on November 17, 2022) the inclusion in the Finance Bill 2022 of a regulatory provision aimed at introducing a minimum rate of 15 percent on the profits of multinational groups starting with tax periods running on and after December 31, 2023.

Indirect Tax |VAT

Voluntary disclosure_| Italian Tax Authorities Provision protocol no. 408592 of November 4, 2022

Implementation of art. 1, par. 634 to 636, of Law no. 190 of December 23, 2014 - Communication for the promotion of voluntary disclosure for VAT taxpayers reporting differences between the data included in the Annual VAT Return and the data communicated to SdI with electronic invoices - according to Legislative Decree No. 127 of August 5, 2015

With provision no. 408592 Italian Tax Authorities announced that the communications of the anomalies resulting from the comparison between the data of the Annual VAT Return and those of the electronic invoices will be sent to the taxpayers via SDI (B2B, B2C and B2G) and the electronic fees, referring to the 2019 tax period.

The information provided will allow the taxpayer to regularize any errors or omissions, through the so-called voluntary disclosure. No matter if the violation has already been ascertained or whether accesses, inspections, audits or other administrative control activities have begun, except for the notification of an act of liquidation, request to pay penalties or, in general, deeds of assessment, as well as communication of irregularity.

The taxpayer, who has received the communication, could request further information and/or report any elements, facts or circumstances of which the tax authorities are not aware of.

The communications will be delivered to the taxpayer's digital domicile and will still be available in his tax box (so called "Cassetto Fiscale").

Dynamic holding company – VAT deduction - Transaction cost - Italian Tax Authorities Tax ruling no. 529/2022

Italian Tax Authorities allow the VAT deduction for transactions costs borne by a dynamic holding company for the benefit of the companies of the group, including the VAT borne for activities carried out before the starting ones (i.e. initial costs). However, the VAT deduction must be exercised within the pro rata limits, taking into accounts the loans granted from the holding to the group's companies, being not ancillary but exempt transactions.

In detail, the Company Alfa (holding) which now stands at the top of a chain of companies, having acquired the company Beta and its chain of holding control, begins to perform various support services (e.g., technical, financial, and strategic/management) towards the group companies, thus qualifying it as a "dynamic" holding. These services, remunerated with a cost plus (costs + mark up), are taxable for VAT purposes. The Company then incurred "transaction costs" related both to the acquisition and to the bond issuance used to finance Beta's pre-existing debts.

In this regard, the Authorities confirms the dynamic nature of such a holding company (given the influence of the holding company in the management of the participated companies), and therefore the consequent right to deduct VAT on purchases. It is also confirmed the VAT deduction of the transaction costs incurred both during the phase prior to the start of the influence, as well as that paid on purchases made later.

In conclusion, it is excluded the ancillary nature of the loan activity carried out by the holding, because of its prevalence, therefore the VAT deduction I sexercised according to the pro rata rules.

Intra-community triangular transaction – plafond | Italian Tax Authorities Tax ruling no. 54/2022

Italian Tax Authorities provides further clarifications with reference to use of the habitual exporter's plafond accrued in the context of intra-Community triangular transactions.

The case concerns a company (Alfa) based in an Extra-EU country and identified for VAT purposes in Italy that, among the various transactions put in place, makes intra-EU purchases from third-party suppliers established or registered for VAT purposes in other EU member states, which are followed by intra-EU supplies to Beta's German VAT number (one of its subsidiaries), in the context of triangular intra-EU transactions, where Alfa operates as a promoter.

In relation to such transaction, Alfa asks whether the promoter of the EU triangular transaction can freely use (without limitation) the VAT plafond accrued under the same transaction.

In this regard, it is useful to remind that the promoters of EU triangular transactions can benefit of plafond:

- fully, for the goods exported within 6 months from their delivery;
- within the limits of the difference between the above point and the amount of goods' sales carried out in their respect within the same year, for other purchases.

The Italian Tax Authorities clarifies that the taxpayers who are in the position of having a restricted plafond are those who take part of a triangulation as a promoter, and this happen - as well as in triangular exports and domestic triangular transactions - in the case of triangular intra-Community supply.

With reference to the use of the plafond by the EU triangulation promoter, it cannot be applied a different treatment neither based on the country in which the parties involved in the transaction are established or identified for VAT purposes, nor because of the fact that the promoter, being the only one VAT identified in Italy, can be the only one entitled to use the plafond accrued to make purchases in Italy without application of tax.

Electronic invoice towards San Marino | Italian Tax Authorities Tax ruling no. 557/2022

Italian Tax Authorities clarify that foreign taxpayers VAT identified in Italy for VAT purposes that carry out transactions with San Marino operators there is no mandatory obligation of issuing/receiving electronic invoices.

In detail, the company, not established but identified in Italy for VAT purposes by appointment of a fiscal representative, asked if is mandatory to issue electronic invoices for transactions carried out with San Marino operators.

Thus since in the Decree ruling the e-invoices between Italy and San Marino (namely, 2 of the Ministerial Decree, June 21, 2021) foreign entities VAT identified in Italy are expressly included amongst those obliged to raise electronic invoicing. However, there are some cases that are expressly excluded by law provisions.

The new system became mandatory as of July 1, 2022.

The Tax Authorities points out that the scope of art. 2, par. 2 mentioned, expressly provides that the issuance of the invoice in electronic format is not mandatory in specific scenarios excluded by the law. Therefore, with the ruling answer at stake it has been clarified that within the excluded cases also falls the case of e-invoices issued by/received by foreign taxpayers VAT identified in Italy for the transactions carried out with San Marino.

In such a case, they can be issued in a paper based format (it is always possible, upon choice, to opt for the application of the e-invoicing regime).

Credit note| Italian Tax Authorities Tax ruling no. 485 of October 3, 2022

Italian Tax Authorities clarified that it is possible to raise the credit note starting from the beginning of the bankruptcy proceeding, and also confirmed the right of deduction directly in the Annual VAT Return of the year in which the tax point to raise the credit note has occurred, even if the taxpayer was not lodged in the proceeding and further to the denial of the administrator.

However, Italian Tax Authorities has also pointed out that the missing payment further to bankruptcy proceedings must be referred to the overall original transaction, therefore, it is not possible to raise a credit note only for the amount of the VAT, but the credit note should indicate both the taxable amount and the VAT. Such principle has to be also applied to bankruptcy proceedings starting from May 26, 2021, under the new rules provisions allowing the issuance of a credit note from the starting date of the proceeding.

In detail, as already mentioned in ruling answer no. 801/2021, it is not possible to raise a credit note only with VAT, but it is needed to mention also the tax base. Therefore, being passed the deadline to re-issue it correctly, Italian Tax Authorities provided the possibility to issue it again at the end of the bankruptcy proceedings, provided that the taxpayer is lodged in the proceeding.

Indirect Tax | Customs

Retrospective transfer pricing adjustments and customs value

In May 2022, the German Federal Fiscal Court (BFH) brought to a closure a dispute regarding **retrospective transfer pricing adjustments to the declared customs value** of imported goods, implementing the preliminary ruling of the CJEU C-529/16 (Hamamatsu Photonics Deutschland GmbH vs Hauptzollamt München).

The BFH first noted that the customs value of imported goods is determined at the time of the acceptance of the customs declaration, and on the basis of the data and information available at that time. As a result, **changes in the factual or legal circumstances occurring after the payment of import duties, could not, in principle, justify a repayment of such duties.** The transaction price forming the basis of the customs value could be subsequently corrected only in special circumstances.

The corrections of the customs value must be based on the objective and quantifiable information available on the date of acceptance of the customs declaration. This principles also applies when the customs value is determined on the basis of the fall-back methodology. **That precludes retrospective transfer pricing adjustments which do not meet these criteria**. If the contrary were true, the customs value thus determined (at the time of the acceptance of the customs declaration) would not be in line with Article 8.3 of the WTO Customs Valuation Agreement and the Union Customs Code (UCC).

Combined Nomenclature 2023

On 31 October, **Commission Implementing Regulation (EU) 2022/1998** amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff was published in the OJEU. **The new customs tariff will apply from 1 January 2023.** The modification will affect both exports and imports, since **the correct application of the tariff treatment of duties, non-tariff measures and VAT and excise duties** treatment depends on the exact identification of the combined nomenclature of each product. Therefore, the above-mentioned amendment could affect the customs planning of the operators, who need to check the classification of their products to adjust it to the new tariff and avoid violations.

Single Window for Customs and Controls

With the Circolare of the Italian Customs Agency 38/2022 of 8/11/22, the first experimentation phase of the **SUDOCO - *Sportello unico doganale e dei controlli* (Single window for customs and control)** began in the 'pilot' port of La Spezia.

The project aims at **coordinating all procedures and controls related to the entry/exit of goods in/from the national territory, allowing their monitoring**.

SUDOCO will consist of three functional modules:

- "***Controls Management"(Gestione Controlli)*** will allow the Italian Customs Agency to coordinate the inspections requests submitted by the Administrations involved in the process of import of goods into the EU customs territory so that all controls are carried out at the same time and in the same place (**one stop shop**).
- "***Certificates Management***" (***Gestione Certificati)*** will offer a single window (**single entry point**) to economic operators and Administrations for the submission of authorization in interoperability between the systems of the Italian Customs Agency and other Administrations.
- "***Goods Tracking***" ***(Tracciamento Merci)*** will make it possible to monitor logistic-procedural operations, allowing to economic operators and Administrations **physical and documentary tracking**.

AIDA Reengineering | New customs import declarations: replacement of the 'old' 'IM' data record

Following the previous TAX Alert on the so-called "re-engineering" of AIDA with particular reference to the replacement of the "IM" data record and the "DAU" format for the submission and customs import declarations management.
With the Note Prot.: 511592/RU of 11 November 2022, the Italian Customs Agency announced the closure of t**he "IM" data record with effect from 30 November 2022 at 09:00 a.m.**.

Starting from that date, operators will have to submit the customs import declarations using the "H" data record in the IT System "AIDA 2.0.". In addition, in order to ensure the correct registration of the customs declaration according to art. 25 Presidential Decree 633/1972, as also clarified by the Revenue Agency with the Answer 417/E/2022, importers will have to collect the **Accounting Prospectus ("Prospetto Contabile")**, which is required to comply with the accounting and tax

obligations under VAT regulations. This statement can be downloaded directly through the telematics services in AIDA 2.0. (*see our previous information on the subject*).

As clarified by the Italian Customs Agency, the timing was defined in consideration of several factors, such as the software updates released over time in the production environment and the traders' level of adherence to the new services, as well as taking into account the upcoming EU deadline (31 December 2022) for updating import customs clearance systems.

Plastic and Sugar Tax: Postponement to 2024

The Council of Ministers n. 5 of 22 November 2022 approved the draft budget law for the 2023 financial year. The draft law has predicted the suspension of the entry into force of the Plastic Tax and the Sugar Tax, which would be postponed to 1 January 2024. The two taxes, introduced through the 2020 Budget Law (n. 160/2019), provide a taxation on the consumption of single-use plastic products or "MACSI" (Plastic Tax) and sweetened drinks (Sugar Tax). The postponement will allow the operators impacted by the two taxes to prepare in advance the necessary measures for the tracing of the information for the calculation of the tax, carried out on the basis of the current rates (equal to €0.45/Kg of single-use virgin plastic in the case of the Plastic Tax, and €10/Hl for finished products or €0.25/Kg for products that require dilution for use in the context of the Sugar Tax).

Global Employer Services

Welfare: the 2022 fringe benefit tax relief rises to EUR 3,000 | Circular letter no. 35 of November 4th 2022 - Decree “Aiuti Bis" and Decree "Aiuti Quater"

The amendment, introduced by art. 3 paragraph 10 of the Law Decree 176/2022 (so-called *Aiuti-quater*) in force since November 19th 2022, concerns the art. 12 of Legislative Decree 115/2022, which, in the original version, provided that "***Limited to the 2022 tax period***, *notwithstanding the provisions of art. 51, paragraph 3, of the Italian Tax Code (“TUIR”) ..., the value of the goods supplied and services provided to employees and the sums paid or reimbursed to them by employers for the payment of domestic users of the integrated water service, electricity and natural gas within the overall limit of* ***EUR 600*** *do not constitute taxable income".*

The "*Aiuti quater*" decree stated that the exemption limit, ordinarily provided for an amount equal to EUR 258.23 and initially raised to EUR 600 by the *"Aiuti bis*" decree for 2022, now increases to **EUR 3.000**.

It should be noted that, with the previous amendment (*Decree Aiuti bis*), the scope of the facilitation was expanded by including the sums paid or reimbursed by employers in relation to the payment of domestic users, integrated water service, electricity and natural gas.

The Tax Authority has recently provided clarifications on this provision with Circular Letter no. 35 of November 4th, 2022, stating that exclusively for the 2022 tax year, the discipline referred to in art. 51 paragraph 3 of the Italian Tax Code (TUIR) must be considered modified as follows:

1. The fringe benefits granted to workers also include sums paid or reimbursed to them by employers for the payment of **domestic utilities** of the integrated water service, electricity and natural gas;
2. The maximum limit of exclusion from the employment income of the goods sold and services provided, as well as the sums paid or reimbursed for the payment of domestic utilities, is **raised** from EUR 258.23 to EUR 600 (limit now modified to 3.000 euros).

It can therefore be considered that the clarifications provided by Circular Letter no. 35 of November 4th, 2022, are also applicable in relation to the new recently amended ceiling (limit now modified to EUR 3.000), thus providing for a significant increase in the limit of non-taxation of fringe benefits.

On the other hand, the Circular Letter did not provide for any change to the functioning of the taxation regime in the event of **exceeding** the exemption limits established by the Law, so that, in the event of an exceedance, the employer must subject to taxation the entire amount paid, including the portion below the same ceiling.

It follows that, for 2022, the value of the goods sold, and services provided to employees as well as the sums paid or reimbursed to them by employers for the payment of domestic utilities of the integrated water service, electricity and natural gas within the overall limit of EUR 3.000 do not constitutes taxable income. In particular, fringe benefits will be taxed only if the threshold of EUR 3.000 is exceeded, it being understood that in this case they will be **fully** taxed, including the portion below the aforementioned ceiling.

Going deeply in the clarifications provided by Circular Letter no. 35 of November 4th, 2022, the main areas subject to intervention are highlighted below:

- Scope of application

  The *fringe benefits* also include the goods sold and services provided to the employee's spouse or family members indicated in Article 12 of the Italian Tax Code (TUIR), as well as goods and services for which is attributed the right to obtain them from third parties. These *benefits* are also payable *ad personam* and concern the holders of both employment income and assimilated to employment income (i.e. *director*s).

  Extension of the benefit to domestic utilities

  Only for 2022, the "Aiuti-bis" decree included domestic utilities among the fringe benefits granted to employees. In this regard, the Circular Letter explains that domestic utilities are understood to be those relating to residential properties owned or held, on the basis of a suitable title, by the employee, spouse or family members, regardless of whether or not they have established their residence or domicile in them. This also includes domestic utilities in the name of the condominium (for example water or heating) and those for which, despite being in the name of the owner of the property (landlord), the lease contract expressly provides for a form of analytical and non-flat-rate debit to be paid by the worker (lessee) or by his spouses and family members.

- Tax regulation

  The regulation applicable to fringe benefits for 2022 is that of article 51, paragraph 3, of the Italian Tax Code (TUIR) and the derogation from this paragraph introduced by the "Aiuti bis Decree", concerning exclusively the maximum exemption limit and the types of fringe benefits. Therefore, in the event that, during the settlement, the value of the goods or services provided, as well as the sums paid or reimbursed to the employees by the employers for the payment of domestic utilities for the integrated water service, electricity and natural gas, are higher than the aforesaid limit, the employer must also tax the portion of value lower than the same limit of EUR 600 (limit now changed to EUR 3.000). The exemption limit also applies in the case of *ad personam* disbursements.

- Temporal scope: the extended cash flow principle

  The Circular Letter specifies that the provision in question refers exclusively to the 2022 tax year, emphasizing that the sums and values paid by January 12th of the tax period following the one in which it will occur may also be received in the tax period (principle of extended cash flow), and that the sums disbursed by the employer (in the year 2022 or by January 12th 2023) may also refer to invoices that will be issued in the year 2023 as long as they concern consumption made in the current year 2022.

- Documentation to keep

  It is up to the employer to acquire and keep, in the event of any tax audit, the documentation to justify the amount spent and its inclusion in the limit referred to in article 51, paragraph 3, of the Italian Tax Code. The practice document also clarifies that the employer can acquire a declaration in lieu of an affidavit with which the applicant employee certifies that he is in possession of the documentation proving the payment of domestic utilities and that the same invoices have not already been subject to a request for reimbursement, in whole or in part, from other employers.

- Relationship with "fuel bonus"

  Article 12 of the "*Aiuti-bis*" decree constitutes, for the year 2022 only, a further, different and independent concession with respect to the fuel bonus referred to in article 2 of Legislative Decree no. 21/2022. In this regard, in order to benefit from the tax exemption, the goods and services supplied in the 2022 tax period by the employer to each employee can reach a value of EUR 200 for one or more fuel vouchers and a value of EUR 600 (limit now modified to EUR 3.000) for all other goods and services as well as for the sums disbursed or reimbursed for the payment of domestic utilities for the integrated water service, electricity and natural gas. Exceeding the maximum thresholds envisaged for the fuel bonus (EUR 200), entails the ordinary taxation of the entire amount paid, on the basis of the discipline of article 51, paragraph 3, of the Italian Tax Code. This general rule is understood to be applicable even if the employee has chosen to replace the performance bonuses with the bonus in question and/or with *fringe benefits*.

The facilitation in question applies for now to benefits for the year 2022 and the amounts paid up to **January 12th 2023** will be taken into account, a term which for the extended cash principle also represents the deadline by which the employer can disburse the benefit subject to the exemption regime.

Ruling no. 524 of 25 October 2022 | Special tax regime for Impatriate workers returning to Italy - Individual employed by a holding company who, upon returning to Italy, is employed by one of the subsidiaries for which he was already performing activities as director from abroad

For the purposes of the application of the *Impatriate regime*, the circumstances that, upon returning to Italy, the individual:

- maintains the managing position assumed during his previous employment relationship with the English controlling company; and that

- during the previous employment relationship with the company and before relocating to Italy, has also held the position as director of the Italian subsidiary,

are not limitative for the purposes of benefitting from the tax regime for *Impatriate workers*.

Tax Litigation

Crime of fraudulent tax return by use of invoices for inexistent transactions. | Supreme Court July 15th 2022, n. 32506

The Court of Rome, by the Order of December 28th 2021, challenged to a limited liability company (hereinafter "the Company"), the crime of fraudulent tax return by use of invoices for inexistent transactions.

The invoices concerned have been issued, for sales of goods or services, from suppliers connected to the Company as provided by a special "network agreement".

The judges affirmed the inexistence of the transactions simply arguing the "straight management" ("eterodirezione"), made by the Company, of the said suppliers and the following lose of "self management" by the same suppliers.

The Supreme Court rejected the Order concerned firstly sustaining that, in the light of art. 2497 and following of the Civil Code (concerning "Management and Coordination of companies"), the existence of "straight management" business relations among companies does not necessarily make the straight managed companies as fictitious ones.

Secondly, the Supreme judges consequently argued that the said "straight management" is not sufficient to explain, in itself, that the invoices have been issued, by the named suppliers, for objectively and subjectively inexistent transactions.

On this purpose, the Supreme Court also affirmed that the Court of Rome would have been demonstrate the actual inexistence of the transactions, or the realization of the said transaction by a supplier different from the one resulting from the invoice.

Non-deductible VAT for conciliatory agreements - Non-deductibility for IRES and IRAP purposes | Ruling Revenue Agency No. 541/2022

In the concerned Ruling, the Revenue Agency, in line with principles already expressed, illustrates the conditions required to deduct from the corporate income, for IRES and IRAP purposes, the VAT that has become non-deductible and paid to the Agency following assessments subject to settlement agreements and the related interests.

The Agency points out that, in contrast to the general non-deductibility of VAT as a charge that does not normally affect the result for the year (since compensation and deduction mechanisms are applicable to guarantee the neutrality of the tax), VAT should be deductible in those cases in which it affects the result for the year and only if this derives from objective causes that may affect the right of deduction (legal provisions, exemption from fulfilment of obligations on exempt transactions pursuant to Article 36-bis of Presidential Decree No. 633/1972, so-called partial pro-rata, see Resolution No. 869/E of 19/1/1980) and not from other circumstances (e.g., discretionary choices of the taxpayer not to deduct or not to request the issuance of the invoice to the other party): in order to verify these requirements, the analysis of the individual cases is therefore relevant.

The case at hand concerned companies, operating in the transport and warehousing sector, that received from consortia of cooperatives certain services (porterage and ancillary services) through employees of the cooperatives bearing the burden of the contributions by advancing their payment to the social security institutions. In particular, the same companies: (i) received from the consortia invoices with VAT, deducting it, for the services received and including the amount of the contributions on personnel; (ii) at the same time, they issued invoices without VAT to the consortia, with offsetting credit and debit items, for the chargeback of the contributions on personnel already advanced to the social security institutions, treating them as an advance for another party (Article 15 of Presidential Decree 633/1972). This conduct was challenged by the Revenue Agency due to the tax advantage represented by the VAT deducted by the companies and limited to the proportional share of the sums charged back (without VAT) by the companies themselves to the consortia, for the contributions. That VAT, which had become non-deductible, had then been paid to the Agency under the settlement agreements, together with interest thereon.

In the concerned Ruling, the Agency considers that the VAT is not deductible from corporate income for IRES and IRAP purposes because it is not linked to objective causes of non-deductibility, as it arises from the conduct of the companies which, on the basis of the same conciliatory agreements, violates the principle of inherence for VAT purposes and is a source of abusive situations, with a benefitting tax jump for those companies that (by deducting VAT on purchases and not applying

it on recharges), if they had applied VAT, would not have suffered any burden by being able to exercise the compensation with the consortia.

The Agency therefore concludes that non-deductible VAT is not a productive factor of the business activity and the deduction would not be consistent with the context and the consequences generated in the system, in terms of tax liability, by the taxpayer's conduct.

Finally, with regard to the interests paid by the companies in execution of the conciliatory agreements, the Agency, recalling principles already affirmed (Resolution 178/E of 9/11/2001 and Supreme Court. sentence no. 12990/2007), recalls that interest payable in connection with the assessment of taxes (i) having a "compensatory" function of the delay with which the tax is paid to the State, must be considered autonomously with respect to the regime of the relative taxes; (ii) while being generically functional to maintaining the liquidity of the company (as a temporary availability of the sums not paid to the Agency), they do not derive from financing transactions, i.e. having a "financial cause".

Therefore, Article 96 of the Italian Tax Code (TUIR) does not apply, with the consequent full deductibility of the interests under the general rules governing corporate income (in the case concerned, in the year in which the conciliatory agreements providing for their payment were signed) and also for IRAP purposes (not having a financial cause), provided they are classified according to correct accounting principles in the income statement items relevant to the IRAP taxable base.

"New" burden of proof in the tax trial: legal principle laid down by the Italian Supreme Court

In a recent judgment of October 27th, 2022, no. 31878, the Italian Supreme Court ruled for the first time on the new regime on the burden of proof, provided for in Article 7, Paragraph 5-bis, of Legislative Decree no. 546/1992, implemented by Law no. 130/2022, which states as follows: "*The Tax Authority shall prove in the trial the violations alleged through the challenged assessment*. *The Court bases its ruling on the evidence emerging from the trial and repeals the assessment in case the proof is either absent or it is contradictory or it is however unsatisfactory in order to demonstrate, in a detailed and accurate manner, in compliance with the tax law legislation, the objective reasons on which the tac claim and the penalty application are based. It is on the taxpayer, however, to provide the reasons of the refund application when such application does not follow the payment of the assessment sums"*.

Its innovative character is debated also considering the absence of a reference to the same in the explanatory report as well a specific rule on the trials involved.

Among the scholars, there are those who believe that the new rule is a mere confirmation of the Article 2697 of the Italian Civil Code as supplemented by the principle of so-called proof-proximity principle (DELLA VALLE, DEOTTO-LOVECCHIO); and, on the other hand, there are those who believe that the mentioned explicit statement of the burden of proof is most likely due to the awareness that the principle has not always been followed. Indeed, part of the Court's past and recent case law provides that the burden of proof relies on the taxpayer (MULEO-PISTOLESI-DE MITA).

Basically, from the first point of view, the new rule does not innovate at all, representing a mere confirmation of the case-law of the Supreme Court pursuant to which, starting from Article 2697 of the Civil Code (applicable to tax proceedings), when the appeal is filed against a tax assessment, the burden to prove the facts constituting the tax claim is placed on the Tax Authority (plaintiff in the substantial meaning), contrarily, in the refund claims, the taxpayer must demonstrate the facts constituting the right to be reimbursed.

This rule must be duly combined and complemented with the proof-proximity principle and with the various law presumptions (Article 2728 of the Civil Code).

According to the second opinion, the principle of effective judicial protection and the rule of due process are valued in order to apply the allocation of the burden of proof in conjunction with the proof-proximity principle; from this point of view the scope of the new would be to run counter certain unfavorable case law: for example, the caselaw by which the burden of proof shall be placed upon the taxpayer even in the case of challenging tax assessment as well. This is the case of proof of the existence and pertinence of the cost or purchase (or, in the common system of value added tax where it is necessary, among other things, to prove the realization of the supply of goods/services, in order to exercise a right for deduction of the input tax).

There is also a theory that is placed in an intermediate position according to which, if on the one hand the new rule does not amend the burden of proof's regulation, on the other hand a change within the case-law should be expected.

In this context, the recent judgement of the Court of Cassation seems to concur with the aforementioned first opinion stating that the new clause does not provide for an allocation of the burden of proof other than the one already in force.

The case concerns the Tax Authority's appeal against a judgement which excluded the taxpayer's involvement in a tax fraud, without examining the underlying evidence against the taxpayer.

The Italian Supreme Court upholds the Tax Authority's appeal, stating that the latter provided extensive evidence of the taxpayer's involvement in the alleged fraud under investigation, with the result that it is instead the duty of the taxpayer to prove that he has operated with the utmost diligence required by a shrewd and good faith operator.

The Court gives as grounds for their judgement the new rule provided for in Article 7, Paragraph 5-bis, stating that the new clause does not introduce a new allocation of the burden of proof: the judges must base their decision on the evidence that emerges in the judgment with the consequence that the tax assessment has to be annulled if the Tax Administration has not proved its validity or if it has provided contradictory evidence.

In conclusion, the Supreme Court concurs with the opinion according to which the allocation of the burden of proof is regulated by Article 2697 of the Civil Code supplemented by the proof-proximity principle. Lastly, the Court implicitly states the new clause's applicability to all ongoing tax disputes.

Government Incentives

Procedure for volunteer repayment of the research and development tax credit – Deadline postponed

With article 38 of Decree-Law No. 144/2022 the originally deadline set for September 30th, 2022 for filing the request in order to access to the procedure provided by Article 5, paragraphs 7 to 12, of Decree-Law No. 146/2021 for volunteer repayment of the tax credit for research and development activities provided for by art. 3 of Decree-Law No. 145/2013 has been further postponed to October 31th, 2023. It should be noted that under this procedure, undue use of the research and development tax credit can be regularized without application of penalties and interest.

It should be noted that the procedure is intended for company who would like to repay the credit accrued in the 2015-2019 fiscal years and used for offsetting other liabilities until October 22nd, 2021, if:

- they have actually carried out, by incurring the relevant expenses, activities that in whole or in part could not be qualified as eligible research or development activities in the meaning relevant to the tax credit;
- they have applied par. 1-*bis* of art. 3 of the decree, in a manner that does not comply with the authentic interpretation provision contained in art. 1, par. 72 of Law No. 145 of December 30th, 2018;
- they have made errors in quantifying or identifying eligible expenses in violation of the principles of relevance and appropriateness;
- they have made errors in the determination of the historical 2012-2014 average amount.

Furthermore, the amendment provides also a one-year extension of the deadline for payment of the unduly used credit, which must be paid back in a lump sum by December 16th, 2023, or in 3 equal annual installments (December 16th, 2023 - 2024 and 2025) provided that it has not already been assessed by a definitive deed of the Tax Authority notified before October 22nd, 2021.

Certification of Tax Credit R&D extended to the activities provided by Art. 3 of Decree Law No. 145/2013

It should be noted that art. 23 of Decree Law No. 73/2022, introduced the possibility of requesting a certification attesting to the qualification of investments made or to be made for the purposes of their classification among eligible research & development, technological innovation, design and aesthetic ideation activities as well as for the achievement of the objectives of digital innovation 4.0 and ecological transition in relation to the tax credit for research & development, technological innovation and design activities provided by Art. 1 paragraphs 200 - 203 *sexies* of the Budget Law 2020. With the amendment introduced by art. 38, par. 2, Law Decree 144/2022, such possibility has been extended also in relation to the tax credit for research and development activities provided by art. 3, Law Decree 145/2015 for the fiscal years 2015 – 2019.

Tax credits related to the purchase of electricity and natural gas

Article 1 of Decree-Law No. 176/2022 (so-called "Aiuti-*quarter*" extended for the month of December 2022 the extraordinary contributions for the purchase of electricity and natural gas.

More in detail, for companies with high electricity consumption (so-called "*energy-intensive companies*") whose costs per kWh of the electricity component, calculated on the basis of the average of the third quarter of 2022 and net of taxes and any subsidies, have undergone an increase in the cost per kWh of more than 30 per cent compared to the same period of the year 2019, an extraordinary contribution is recognized to partially offset the higher charges incurred, in the form of a tax

credit, equal to 40 per cent of the expenses incurred for the energy component purchased or self-produced and actually used in the month of December 2022.

Also, with regard to companies, other than energy-intensive companies equipped with electricity meters with an available power of 4.5 kW or more that recorded such an increase in the third quarter of 2022 compared to the same quarter of 2019, a tax credit equal to 30% of the expenses incurred for the purchase of electricity is recognized.

Moreover, a tax credit equal to 40 per cent of the expenses incurred for the purchase of natural gas consumed for uses other than thermoelectric uses is recognized to companies with a high consumption of natural gas (so-called "*gas-intensive companies"*), if the price of natural gas, calculated as the average, referred to the third quarter of 2022, of the reference prices of the Infraday Market (MI-GAS) published by the Energy Market Manager (GME), has undergone an increase of more than 30 per cent of the corresponding average price referred to the same quarter of the year 2019.

The tax credit to the extent of 40% of the expenses incurred for the purchase of natural gas consumed for uses other than thermoelectric uses, is also recognized to companies, other than gas-intensive companies, that have recorded the same increase in the third quarter of 2019 compared to the same quarter of 2022.

The rule also provides for companies other than energy-intensive and gas-intensive companies, following a request submitted to the energy supplier within 60 days of the end of the period, provided that it is the same as the one from which they were supplied in the third quarter of 2019, to obtain from the latter a communication in which the calculation of the increase in the cost of the energy component and the amount of the tax credit due for the month of December 2022, are reported.

The tax credits related the third quarter and to October, November and December can be used to offset any other tax liabilities, but no later than 30th June 2023 and are transferable, only for the full amount, to other entities, including financial institutions and other financial intermediaries, with the possibility of two further transfers exclusively to qualified entities with the obligation to obtain a compliance certification. The tax credit is not relevant for IRES and IRAP purposes and may be cumulated with other incentive concerning the same costs, up to the limit of the cost incurred.

It is also provided that the beneficiaries of the above-mentioned tax credits, shall submit to the Italian Revenue Agency a specific communication on the amount of tax credit accrued in the year 2022 within March 16th, 2023.

Hyper depreciation - replacement investments | Italian Revenue Agency No. 532/2022

In the ruling No. 532 of October, the Italian Revenue Agency provided some clarifications in relation to the sale and the substitution of assets for which is possible to benefit from hyper-depreciation.

In the case under analysis, the taxpayer started, during the fiscal year 2022, a process of disassembling and interruption of the interconnection of some old equipment, who will end in 2023 by selling them to specialized operators and replacing them with new and more performing equipment.

More in detail, the taxpayer asks if:

1. the disassembly of assets and sale of the material is equivalent to the sale of the assets as provided by article 1, paragraph 35, Law No. 205/2017, so the company is allowed to benefit from remaining amount of hyper-depreciation;
2. the timing requirement provided by the law in relation to replacement investments is achieved. According to the law, the sale and the replacement of the old equipment, as well as the interconnection of the new equipment, should take place in the same fiscal year;
3. the hyper-depreciation should continue also during the period between the disconnection of the old equipment and the interconnection of the substitutive equipment, or if it must be suspended during such timeframe.

Concerning the first question, the Italian Revenue Agency agreed with the taxpayer, confirming that the company is allowed to benefit from the hyper-depreciation once the replacement investments had taken place, specifying that the *ratio* of the provision is to preserve the most appropriate investment choices that the company may need to make in order to maintain or increase its level of technological competitiveness, even if they are related to assets that have already benefit of the hyper-depreciation.

In relation to the second point, the Italian Revenue Agency also agreed with the company in relation with the time in which the investment is made. More in detail, based on the information provided by the taxpayer the transfer (transfer of the equipment through a dissembling agreements and sale of the material) and purchase of the new one will take place both in the fiscal year 2023.

Concerning the last question, the Italian Revenue Agency, citing the circular letter n. 9/E of 23rd July 2021, in which it specifies that the interconnection requirement must be maintained throughout the period of use of the incentive, specifies that the benefit from the yearly hyper-depreciation must be suspended during the period between the disconnection of the old equipment and the interconnection of the new equipment.

In other words, during the period of no-interconnection, the yearly amount of the hyper-depreciation should be proportionally reduced, and it could be continued - for the residual amount - only when the interconnection of the new assets is completed.

Hyper depreciation for assets purchased through leasing agreements and interconnected after being activated | Italian Revenue Agency Ruling No. 551/2022

In the ruling No. 551 of November, the Italian Revenue Agency provided some clarifications in relation to the applicability of the hyper-depreciation to assets purchased through leasing contract and interconnected to the productive system after being activated.

In this case, the taxpayer stipulated, in the fiscal year 2019, a leasing contract to buy some equipment who can benefit from hyper-depreciation, for which the order has been accepted and the company paid at least the 20% of the total amount of the investment within the December 31st 2018.

The equipment were delivered and tested in December 2019, but their interconnection with the productive system had taken place only in September 2020.

The company asks if they should calculate the hyper-depreciation from January 2020 to December 2020, considering the entire fiscal year in which the interconnection has been occurred, or only starting from the month of the interconnection and activation.

The Italian Revenue Agency rejected this ruling, declaring the lack of uncertainty in relation to this specific situation, however it specifies that the company could benefit from the hyper-depreciation only for the lease fees referred to the months from September 2020 to December 2020, after the activation of the assets, observing the limitation provided by article 102, paragraph 7, of the TUIR. In this regard, the Italian Revenue Agency, considers that the hyper-depreciation in the event of interconnection made after the purchase of the assets and its activation, cannot be extended also to the portion of the fees incurred in the preceding months since the interconnection requirement must exist together with the activation. In addition, the principle of the reduction of the first deductible depreciation quota relating to the fiscal year of activation cannot be relevant as this is only applicable in the case of the acquisition of the property of assets.

Tax credit for investments in new assets |Timing of investment | Ruling Italian Revenue Agency No. 537/2022

In the ruling No. 537 of October 31st (art. 1, commi 184-197, della L. n. 160/2019 e art. 1, commi 1051-1063, della L. n. 178/2020), the Italian Revenue Agency provided some clarifications in relation to the tax credit recognized for investments in new assets, with a particular focus on the timing of investment, in order to identify the correct tax credit provision applicable to the case under analysis.

More in details, the taxpayer asks for a clarification in order to identify the exact moment in which the transfer of ownership of the assets take place for determine the time in which the investment has been made and identify the applicable tax credit law.

Specifically, the taxpayer made orders for two assets during the fiscal year 2020, which were accepted by suppliers during the same year. Also, he declares that he paid in advance the 20% of the amount of the investment respectively in July 2020 and in April 2020.

These two assets, after being delivered to the taxpayer in February 2021, were tested in June 2021 in order to verify their appropriateness in relation to the technical requirement guaranteed by the suppliers and their functioning. Immediately after the positive feedback of those tests, the company released the Preliminary Acceptance Certificate (PAC) in order to accept the entire supplies and start the warranty duration as defined in the contracts signed with the suppliers.

The taxpayer registered the assets on his asset's book on December 2021; then, the performance tests on these assets were made by the company respectively, in February 2022 and in December 2021. After those tests, the company released the Final Acceptance Certificate (FAC).

At this point, the company asks to the Italian Revenue Agency which ones between the date of PAC and the date of FAC should be considered as the exact moment of the investment.

Since the order approval and the advance payment of at least the 20% of the total costs has both occurred within November 15th , 2020, the tax credit will be applied for the 40%-20% of the investment costs (as provided by article 1, paragraphs 184-197, Law. 160/2019) if the company considers the moment when PAC were released as the moment of the transfer of ownership (June 2021 for both assets) and so the investments could be defined as effective within June 30th, 2021.

On the other side, since the order approval and the advance payment of at least the 20% of the total costs has both occurred within December 31st, 2021, the tax credit will be applied for the 50%-30%-10% of the investment costs (as provided by article 1, paragraphs 1051-1063, Law No. 178/2020) if the company consider the moment when FAC were released as the

moment of the transfer of ownership (February 2022 for the asset A, December 2021 for the asset B), so the investments could be defined as effective within December 31st, 2022.

The taxpayer claims that the investment has been made in the exact moment when the PAC is released.

The fact that, after the functioning test, the equipment started to work represent clear evidence that the supplies are accepted. So, according to the taxpayer, the transfer of the ownership has been occurred after the positive feedback of the functioning test.

Since the official contractual commitment and the advance payment of the 20% of the total costs had taken place in the fiscal year 2020 ("reservation" of investment) and the approval of the supplies, thanks to the signature of the PAC, had taken place within the first semester of the fiscal year 2021 for both investments, the taxpayer claims to apply the tax credit discipline for investments in new assets provided by the article 1, paragraphs 184-197, Law No. 160/2019.

The Italian Revenue Agency agrees with the taxpayer, claiming that the performance test seems not to be crucial in order to determine the certainty of the cost. That test is helpful only as a warranty against hypothetical fails that the functioning test could not detect. So, the investment could be defined as occurred at the acceptance of the functioning test and the Preliminary Acceptance Certificate is signed.

Moreover, the Italia Revenue Agency claims the applicability of the tax credit discipline for investments in new assets provided by the article 1, paragraphs 184-197, Law No. 160/2019, since the "reservation" and the "implementation" of both investments had taken place, respectively, during the fiscal year 2020 and within June 30th, 2021.

Directorial Decree November 14th 20222 |Agreements for innovation | second call | *D.M. 31 December 2021*

With the Directorial Decree of the Ministry of Enterprise and Made in Italy of November 14th 2022, the terms and procedures for the grant submission of the second call provided by Ministerial Decree of 31 December 2021 (c.d. "**Agreements for innovation**") has been established.

The call finances projects relating R&D activities aimed at creating new products, process, services or significant improvement of products, process or services for the development of enabling technologies in relation to the second Pillar of the "Horizon Europe" research and innovation framework program, pursuant to Regulation (EU) 2021/695 of the European Parliament and of the Council of April 28th, 2021.

In order to be eligible the research and development projects should have the following requirements: minimum amount of investment 5 million euros; minimum duration of 18 months and no more than 36 months after the submission of the application to Ministry.

The incentive is granted in the form of a direct grant to the expense and, possibly, of a subsidized loan in compliance with the following limits and criteria:

- maximum 50% of the eligible costs for industrial research and 25% for experimental development;
- the subsidized loan, if requested, can only be granted to companies, within the limit of 20% of the total eligible project costs.

Companies of any size, with at least two approved financial statements, which carry out industrial, agro-industrial, artisan or industrial services activities (activities pursuant to article 2195 of the civil code, numbers 1, 3 and 5) as well as research activities (*i.e. research centres*) are eligible for this incentive.

Companies can also submit projects jointly, up to a maximum of five subjects including research organizations.

A proposing subject can submit only one application as sole proposer or as the leader of a joint project.

Costs are eligible for:

a) personnel expenses (employees or self-employed), directly involved in carrying out the relevant activities;
b) depreciation, the capital amount of lease agreements, rent and other expenses relating to tangible and intangible assets used in carrying out the eligible activities;
c) consultancy expenditure and equivalent services concerning exclusively to the relevant activities;
d) general costs calculated on a flat-rate basis in the amount of 25 per cent of the direct, eligible costs of the project;
e) expenses for materials, used in research and development activities.

Applications for grant can be submitted from 10:00 to 18:00 every working day, from Monday to Friday starting from **31 January 2023**.

The preliminary assessment of the grant application takes place in compliance with the daily chronological order of submission.

Applications presented on the same day are therefore considered as submitted in the same moment (Daily counter). Following the verification of the availability of financial resources, the preliminary investigation provides for an administrative, financial and technical evaluation, based on the documentation presented.

In the event that the preliminary assessments are concluded with a positive outcome, the Agreement for innovation is defined between the Ministry, the proponents and any public administrations interested in supporting the research and development project.

After the signing of the Agreement, the proponents are required to present the documentation useful for the definition of the concession decree.

FSI

VAT exempted financial services – Services provided to a securitization vehicle | Ruling revenue Agency n. 513/2022

With ruling n. 513/2022, the Italian Tax Authorities provide guidelines on the VAT treatment applicable to certain services provided to an Italian Special Purpose Vehicle incorporated under the Italian securitization Law (hereinafter referred to as "Italian SPV")

The Claimant is an Italian financial intermediary investing into Italian SPV, issuing Asset backed securities ("ABS"). In this respect, services provided by the Claimant in favour of Italian SPV are aimed at identifying new investment opportunities in the Non-Performing Loans ("NPLs") market. For the services supplied, the Claimant receives a consideration determined as a percentage of the purchase price of the NPLs acquired.

The Claimant deems that the mentioned services should be regarded as exempted under art. 10, para. 1, n. 1 – or alternatively para. 1, n. 4) and 9) – of D.P.R. no. 633/1972 (VAT Decree).

Italian Tax Authorities recall the ECJ cases and Revenue Agency's rulings, where it has been stated that to be characterized as exempt transactions, services provided shall "form a distinct whole, fulfilling in effect the specific and essential functions" of an exempted service. On that basis, and in light of principles outlined by ECJ case law, Revenue Agency specifies *inter alia* that to confirm the application of VAT exemption both (i) the functional qualification of service as "financial" and (ii) the level of responsibility assumed by the provider in relation to such service shall be verified, in order to avoid that mere supporting, technical or administrative services are regarded as "financial exempt transactions".

However, Revenue Agency does not take a definitive position on the case under analysis, whereas the Claimant is responsible to identify the correct VAT treatment by applying the principle recalled in the ruling, verifying in particular that the service provided to Italian SPV (i) does not merely relate to the general management of the financing activity (ii) compensation agreed does not remunerate the mere support in identifying new investment opportunities. Should not these circumstances be verified, the service will not fall within the scope of the VAT exemption under art. 10, para. 1 of the Italian VAT Decree.

Referring to the application of VAT exemption provided for by art. 10, para. 1, n. 4) and 9) of VAT Decree – *i.e.* intermediation on securities and financial transactions – Revenue Agency recalls the EJC case law, Working Paper n. 849/2015, as well as rulings already published. In particular, Italian Revenue Agency refers to the following conditions: (i) services provided may, *per se*, create, alter or extinguish parties' rights and obligations in respect of securities; (ii) the provider should be regarded as an "intermediary", namely should not be regarded as one party of the contract relating to securities.

Also for this service, Italian Tax Authorities does not take a final position on the specific case, concluding that the Claimant shall qualify the service under analysis as VAT exempt verifying the general principles outlined above.

NID deduction ("ACE") – Participating Financial Instruments | Ruling no. 552/2022

With Ruling no. 552/2022, the Italian Tax Authorities ("ITA") states that cash contributed in exchange for convertible participating financial instruments (hereinafter, the "PFIs") cannot be computed as an equity increase relevant for ACE purposes.

The case under analysis relates to PFIs convertible into shares issued by an Italian innovative start-up (the Claimant) and subscribed by new investors, namely other than the existing shareholders of the issuing company.

Under the relevant Terms and Conditions, PFIs are automatically converted into shares alternatively at the termination of contract, or earlier upon certain agreed conditions.

From an accounting standpoint, the Claimant notes that the contribution is booked in a specific equity reserve.

Italian Revenue Agency opinion is that, when the subscription of FPIs occurs, the investors cannot be actually qualified as shareholders. Hence, regardless of the accounting results, the contribution registered in equity side does not meet the requirements provided for by the Italian law – *i.e.* art. 5 of Ministerial Decree of 3 August 2017 and the explanatory memorandum to the Ministerial Decree of 14 March 2012 – and therefore cannot be considered as an increase relevant for NID purposes until the FPIs are converted into shares.

Domestic exemption for capital gains realised by an Irish SPV upon disposal of Italian ABS | Ruling. no. 556/2022

Italian Revenue Agency's Ruling no. 556/2022 clarifies the tax treatment applicable to capital gains realised by an Irish Special Purpose Vehicle ("Claimant" or "Irish SPV") on the disposal of Italian Asset Backed Securities (ABS) issued by an Italian SPV and, in particular, if the domestic exemption regime available under article 5, of Legislative Decree no. 461/1997 could be applied.

In the present case, the Claimant has been incorporated as an Irish Designated Activity Company ("DAC") with the sole aim of carrying out securitization transactions under the Irish securitization law.

In addition, it is noted that (i) a Jersey portfolio management company subject to "Jersey Financial Services Commission" ("JFSC") regulatory supervision therein has been appointed by the Irish SPV (ii) the Claimant confirms to have specific competences and experience in transactions of financial instruments.

The Irish SPV claimed the domestic tax relief available *inter alia* for foreign institutional investors under article 5 of Legislative Decree no. 461/1997, recalling the exemption's conditions provided for by article 6 of Legislative Decree no. 239/1996.

In a nutshell, Italian Revenue Agency firstly recalls the clarification outlined in the Revenue Agency Guidance no. 23/2002, namely the definition of 'institutional investors' as those entities whose principal activity is managing investments on their own account or on behalf of third parties (regardless of the legal or tax status they have in their Country).

Italian Revenue Agency deems that the exemption regime (originally available to those entities subject to tax in white-list Countries), has been subsequently granted also to those 'institutional investors' not subject to tax in the Country where they are established.

In this respect, Italian Tax Authorities pointed out that the Claimant is a DAC subject to tax in Ireland under Section 10 of Taxes Consolidation Act. On this basis, Italian Revenue Agency concludes that the Irish SPV may not be regarded as an institutional investor being subject to tax in Ireland.

As a conclusion, Italian Tax Authorities confirmed the application of domestic tax relief on Italian-sourced capital gain realised by the SPV, since it is resident in a white-list country and subject to tax therein (without further investigating on the qualification of the SPV as 'beneficial owner').

VAT treatment of the hybrid token| Ruling no. 507/2022

With Ruling no. 507/2022, the Italian Tax Authorities clarifies the VAT treatment applicable to certain utility tokens.

The Claimant is a Company whose services consist in protecting music copyright through a blockchain authentication process. For this service the Claimant issues invoices subject to standard VAT rate.

For funding purposes, the Claimant would issue certain utility tokens via an Initial Coin Offering (ICO) through a platform enabling the tokens' pre-sale and trading. In this respect, the Claimant grants discounted prices on the copyright protection services provided to those clients holding tokens.

The Claimant asks for clarifications about the correct VAT treatment applicable to the transaction, since the information on the tokens' holders necessary to apply the proper VAT regime will be available only when the token is used by them – *i.e.* when the copyright protection services are provided by the Claimant – and not when tokens are purchased by the holders.

The Italian Tax Authorities preliminarily refers to guidelines provided with Ruling no. 14/2018 and no. 110/2020, highlighting that digital token can be either security token or utility token. While the first grants financial and/or administrative rights, utility tokens usually grant certain rights on products or services.

Revenue Agency then clarifies that in the present case, and from a VAT standpoint, utility tokens may not be regarded as "traditional vouchers". This is because it is uncertain if the tokens' holder will exercise the related right or, otherwise, will choose to keep the tokens (as a sort of investment) rather than sell the tokens in order to realise the capital gain. In other terms, these utility tokens should qualify as "*hybrid tokens*".

Italian Revenue Agency qualifies the utility tokens as mere right to receive a discount on such services (s.c. "Documenti di legittimazione" under Art. 2002 of the Italian Civil Code). Consequently, Italian Tax Authorities concludes that in the present case the purchase of these utility tokens under the ICO should not be subject to VAT, according to art. 2(3), lett. a) of the Italian VAT Decree.

However, when such utility tokens are used to purchase the services rendered by the Claimant, they will be subject to the same VAT treatment applicable to the services provided.

OIC- Last clarifications

1. OIC has informed (17th October) that the next accounting standard on revenue (OIC 34) will have 1st January 2024 as mandatory first application date.
2. OIC has published (18th October) in a draft version the Documento interpretativo 11 "Aspetti contabili relativi alla valutazione dei titoli non immobilizzati", regarding the accounting effects of Decreto Legge 21st June 2022, n. 73, which permits not to reduce at market value financial assets classified as current if the loss is considered to be not durable. The difference between the carrying amount of the financial assets and their market value has to be accrued to a not distributable reserve. In case the profit of the period or other available reserves were of an amount lower than the not-distributable reserve, this one shall be build-up with profits of subsequent periods.

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